

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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|------------------------------|---|--------------------|
| JOSE LUIS SANCHEZ, | : | |
| | : | |
| Plaintiff, | : | 14 Civ. 5468 (HBP) |
| | : | |
| -against- | : | OPINION |
| | : | <u>AND ORDER</u> |
| CHARITY REST. CORP, d/b/a/ | : | |
| "Caridad Restaurant," LAZARO | : | |
| PICHARDO and RUBEN PICHARDO, | : | |
| | : | |
| Defendants. | : | |

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PITMAN, United States Magistrate Judge:

This matter is before me on the parties' joint application to approve the settlement reached in this matter. The application was made immediately before the trial was scheduled commence on December 3, 2015. The parties have consented to my exercising plenary jurisdiction pursuant to 28 U.S.C. § 636(c).

This is an action for allegedly unpaid overtime pay brought under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 et seq. and the New York Labor Law. Plaintiff was formerly employed as a cook at a restaurant owned and operated by the defendants and located at 51 East 170th Street, Bronx, New York. Exclusive of liquidated damages, plaintiff claims he is owed \$98,580 in unpaid overtime. Plaintiff also claims that he is owed approximately \$178,198 in liquidated damages plus an addit-

tional \$5,000 for violations of certain New York State notice requirements. Defendants claim that plaintiff did not work the hours he claims to have worked and that he took daily breaks during the work day for which he is not entitled to be paid. Defendants do not contest the notice violations. Neither side has any records concerning the hours plaintiff, and it appears that the only evidence concerning the hours plaintiff worked is the testimony of plaintiff and the two individual defendants.

The gross settlement amount is \$140,000.00.¹ The foregoing settlement was reached after repeated a lengthy settlement conference attended by counsel for both sides and the principals.

Court approval of an FLSA settlement is appropriate "when [the settlement] [is] reached as a result of contested litigation to resolve bona fide disputes." Johnson v. Brennan, No. 10 Civ. 4712, 2011 WL 4357376, at *12 (S.D.N.Y. Sept. 16, 2011). "If the proposed settlement reflects a reasonable compromise over contested issues, the court should approve the settle-

¹The parties agree that this sum will be paid as follows: (1) \$25,000 to be paid within 45 days of my Order approving the settlement; (2) \$115,000 to be paid 24 equal monthly installments thereafter. Each of the defendants also agrees to execute a confession of judgment in the amount of \$140,000; in the event of default, the confession of judgment can be entered for the actual amount of the settlement remaining unpaid as of the date of the default. The settlement funds will be paid to plaintiff's counsel and will be reported to the relevant taxing authorities on a Form 1099. Finally, the parties agree to exchange general releases.

ment." Id. (citing Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1353 n. 8 (11th Cir.1982)).

Agudelo v. E & D LLC, 12 Civ. 960 (HB), 2013 WL 1401887 at *1 (S.D.N.Y. Apr. 4, 2013) (Baer, D.J.). "Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement." Beckman v. Keybank, N.A., 293 F.R.D. 467, 476 (S.D.N.Y. 2013) (Ellis, M.J.), citing Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1353-54 (11th Cir.1982).

I conclude that the settlement reached by the parties is fair and reasonable. Plaintiff has no written records of the hours that he worked. Although plaintiff's recollection of his hours is sufficient to prove the hours that he worked, Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946), superseded by statute, Portal-to-Portal Act of 1947, 29 U.S.C. § 216(b) (2006), as recognized in Gorman v. Consol. Edison Corp., 488 F.3d 586, 590 (2d Cir. 2007), his recollection is not binding on the fact finder. Given plaintiff's interest in the outcome and the contradictory testimony defendants would offer if the case proceeded to trial, it is probable that I would apply some discount factor to plaintiff's claimed hours or may conclude that plaintiff has no claim for overtime pay at all. Nevertheless,

the settlement gives plaintiff more than his claimed actual damages.

In addition, although the settlement does not award plaintiff all of the liquidated damages to which he may be entitled, the fact that the settlement awards more than one hundred cents for each dollar of actual damages suggests that plaintiff will be receiving some liquidated damages.²

The fact that the matter is being resolved by way of settlement also eliminates the burden and uncertainty of collection proceedings.

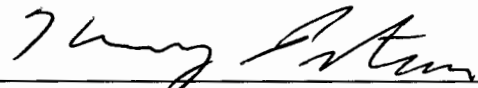
Given the conflicting evidence, the quality of the evidence and counsel and the allocation of the burden of proof on plaintiff, the settlement represents a reasonable compromise with respect to contested issues. I, therefore, approve it. Reyes v. Altamarea Group, LLC, 10 Civ. 6451 (RLE), 2011 WL 4599822 at *6 (S.D.N.Y. Aug. 16, 2011) (Ellis, M.J.).

²The parties also dispute whether defendants' sales meet the \$500,000 gross sales requirement that must be met before an employer is covered by the FLSA. This, issue, however is not of great importance. The weight of authority holds that the \$500,000 gross sales requirement is not jurisdictional. Angel v. Harvest C-Food Inc., 14 Civ. 6035 (SHS), 2015 WL 7288622 (S.D.N.Y. Nov. 16, 2015). Thus, the gross sales requirement only impacts plaintiff's right to recover liquidated damages under the FLSA. Even if defendants' sales did not equal or exceed \$500,000, the Court would still have subject matter jurisdiction to address his claims under the New York Labor Law.

The parties having reported a settlement, the complaint is dismissed with prejudice and without costs. The Clerk of the Court is directed to mark this matter closed.

Dated: New York, New York
December 4, 2015

SO ORDERED

A handwritten signature in cursive script, appearing to read "Henry Pitman", is written over a horizontal line.

HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:

All Counsel